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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONINO VALENTI AND JOSEPH C. JULIANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority opinion of the Court of Appeals (R. II, 247–253) [1] is reported at 206 F. 2d 207, and the dissenting opinion (R. II, 253–259) is reported at 206 F. 2d 211.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1953 (R. II, 259–260). The

[1] "R. II" refers to the gray "Appendix to Appellee's Brief", which is the second half of the printed transcript of the record; "R. I." refers to the blue "Appendix to Appellants' Brief," which is the first half of the printed transcript of the record. "Tr." refers to the complete typewritten transcript which is filed with the Clerk.

petition for a writ of certiorari was filed on September 16, 1953, and granted on November 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial judge's examination of witnesses and his directions to counsel deprived petitioners of a fair and impartial trial.

2. Whether unresponsive statements volunteered by a government witness on cross-examination which the court ordered stricken from the record were correctly held not to require the declaration of a mistrial.

STATEMENT

Petitioners Giallo, Valenti, and Juliano were charged, along with others, in the first count of an indictment returned in the United States District Court for the Southern District of New York with a conspiracy under 18 U. S. C. 371 to commit offenses against the United States in violation of certain liquor control statutes under Title 26, United States Code (R. I, 13–15). In the second count petitioner Juliano was charged, along with others, with possession of an unregistered still in violation of 26 U. S. C. 2810 (a), 53 Stat. 308 (R. I, 15). The jury found all three petitioners guilty under count one, but was unable to agree on count two as to petitioner Juliano (R. I, 133, 134). Petitioners Giallo and Valenti were

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sentenced to imprisonment for five years (R. I, 9–10), and petitioner Juliano was sentenced to imprisonment for 18 months under count one (R. I, 10).

On appeals from the convictions (R. I, 164–167), the judgments were affirmed by the Court of Appeals for the Second Circuit, one judge dissenting (R. II, 260). The majority opinion held, insofar as here pertinent, (1) that the court's discretion to participate in the examination of witnesses was exercised within permissible bounds (R. II, 249); and (2) that a motion for a mistrial, on the ground that a government witness twice volunteered unresponsive and allegedly prejudicial answers on cross-examination, which the court had ordered stricken, was properly overruled (R. II, 249–251). Judge Frank dissenting, was of the opinion that the trial judge's participation in the trial exceeded the limits of judicial discretion by reason of his partisan cross-examination of petitioner Juliano and other defense witnesses, and his unwarranted remarks to defense counsel (R. II, 253, 257).

The evidence may be summarized as follows:

On February 15, 1950, treasury agents, armed with a search warrant, discovered a still and various distillery equipment on a farm in West Shokan, New York, owned by petitioner Juliano (R. II, 240–246). In 1946 Juliano had purchased the 117-acre farm, which was encumbered

by a GI mortgage for $9,000 and consisted of a 7-room house, a barn, a triple garage and a tool shed (R. II, 40–41). After attempting unsuccessfully to operate the farm, Juliano moved his family to New Berlin, New York, in September 1949 (R. II, 42, 45, 170; R. I, 26–27). According to Juliano's testimony—he being the only one of the petitioners who testified—during the first week of December, 1949, he returned to the farm and without obtaining the lessee's street address or the names of any references, rented the barn and house for $65 per month to a total stranger, who gave him a card bearing the name "Giollanno Trucking" (R. II, 51–53, 55, 97). Juliano left $5,000 worth of equipment in the triple car garage (R. II, 57). The $65 monthly rental was paid on two occasions, once by the stranger renting the premises and once by another young man at the house (R. II, 54–55; R. I, 27, 28).

A few days before Christmas 1949 Juliano returned for an overnight trip to the farm to find two other men, one of whom was named Jack and said he was the son of the man who rented the farm (R. II, 65, 98–99, 106–107). Juliano testified that on February 11, 1950, he returned to the farm to pick up some of his tools, met a man named Frank and another who could not speak English, and slept there that night. Juliano stated that during the five months prior to that date he had returned to the farm four or five

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times to "pick up some of [his] belongings." (R. II, 46–49.) Although Juliano testified that he did not ask the men at the time what their business was, he ate meals with them and on one occasion bought a telephone and its necessary equipment for them (R. II, 107, 110, 126, 143–144, 151–153).

Defendant DiLorenzo, who was charged under count one and pleaded not guilty but whose case was severed (R. II, 22), testified that in June 1949 he had a conversation at the Academy Wire Products Company in Pelham, New York, with petitioners Giallo and Valenti, the proprietors of that business. Valenti informed DiLorenzo, a used car dealer, that they wanted to buy a Ford F–8 truck to "carry a heavy load of sugar" and for the "illegal purpose of alcohol and sugar." Following instructions, DiLorenzo obtained such a truck. (R. II, 1, 2–5, 25–26, 36.) The man whom Giallo and Valenti presented as the person in whose name the truck was to be registered introduced himself as Giollanno, but was really the defendant Bosco (R. II, 5–6, 10). In July 1949, and about six times thereafter, DiLorenzo purchased from Giallo and Valenti untaxed alcohol in quantities of as much as 300 gallons. The alcohol was delivered by defendant Schick for a DiLorenzo customer in Connecticut in the same truck DiLorenzo had procured for Giallo and Valenti. (R. II, 8–9, 10–13, 15, 28.)

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In September 1949 Bosco, introducing a partner as Giollanno, rented a garage from one Roschitsch for parking the truck at Kingston, New York (R. I, 67–71). Government agents on several occasions during January and February 1950 had observed the truck transporting heavy loads of sugar from New York City to the vicinity of Kingston and to Juliano's farm (R. I, 20–21, 149; R. II, 243–244). A search warrant was obtained on February 14, 1950, and on February 15 government agents seized property used in the operation of a still at the farm, and certain receipts, found in Juliano's desk and in a Navy type jacket, for items which could be used in a still (R. II, 240–246; R. I, 21–22).

Juliano testified that on February 16, 1950, when he was on his way to the farm, some neighbors advised him not to go there, since there was trouble with "State Troopers, Federal investigators, and the biggest distillery you ever saw." Juliano became panicky and returned about 100 miles to his home at New Berlin. (R. II, 80–82, 147–148.) A state trooper advised Juliano to return to the farm at West Shokan, and on February 17 he did so. He was later arrested and questioned by the authorities at Newburgh, New York. (R. II, 82–86, 94–95.) Petitioners Giallo and Valenti were arrested after the return of the indictment on March 29, 1951 (R. I, 51).

SUMMARY OF ARGUMENT

I

Petitioners were not deprived of a fair and impartial trial in violation of the Sixth Amendment. Their contention that the trial judge revealed an attitude partial toward the Government and adverse to defense witnesses and counsel, and committed reversible error by reason of his partisan examination of witnesses and his directions to counsel, is without merit.

A federal judge in a jury trial is not a moderator who presides, rules on the admissibility of evidence, and submits questions to the jury for determination. For the purpose of eliciting the truth and a full disclosure of all material facts the judge has the right to interrogate witnesses, and the extent of this interrogation is a matter within his sound discretion. Even if a large number of questions are asked by the judge, this alone does not constitute error. The alleged partisanship of the judge must be examined in the light of the setting of the entire record.

A reading of the entire record, including the typewritten transcript, discloses that the judge with considerable patience sought to ferret out the truth by examining both government and defense witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. Neither the number of questions asked, nor the fact that the responses

to the inquiries turned out to be adverse to the defense rather than the prosecution, demonstrated improper, partial advocacy on the part of the judge. He acted well within the bounds of permissible discretion in conducting the trial, and no reversible error resulted.

A. Even though the answers to some of the judge's questions of petitioner Juliano cast doubt on Juliano's credibility, almost any questioning by a judge may incidentally have that effect if the witness's answers appear to be false, as was true of Juliano's testimony. Unless one assumes the court and jury both knew the answers to the questions before they were asked, an entirely unwarranted assumption, it appears that the purpose and effect was to arrive at the truth rather than to make the court's views known to the jury. The judge evinced an impartial attitude in making numerous rulings in favor of the defense during the course of Juliano's testimony, and properly left the question of his credibility for determination of the jury alone.

B. It is complained that when defense counsel attempted to impeach the government witness DiLorenzo on the basis of his criminal record, the judge interfered to rehabilitate him. However, it was not an undue interference with cross-examination to restrict defense counsel when he attempted to bring out all the circumstances of the witness's admitted manslaughter conviction to show that the death of two children occurred

during the illegal operation of a still. Since the witness admitted that the manslaughter conviction resulted from the operation of a still and the circumstances of this prior conviction were collateral to the case, the judge acted within his sound discretion in limiting further cross-examination.

When the judge asked DiLorenzo, after he had denied guilt of the conspiracy charges, if he meant that he had nothing to do with the operation of the still but was just a customer, and the witness answered in the affirmative, this merely clarified his position. He was in effect repeating his previous testimony that his dealings with petitioners Giallo and Valenti were limited to selling them a truck and buying some alcohol, from which the jury could have inferred that he was an accomplice to the conspiracy whose evidence should be received with great caution, despite his protestations of innocence.

C. In instances where the judge examined other witnesses he did not show prejudicial partisanship for the Government. Some of these incidents involved inconsequential and immaterial matters, and some were concerned with parties other than the petitioners. In other instances the judge asked questions in impartial and proper form for the purpose of eliciting the complete truth.

D. Some of the challenged remarks by the judge to defense counsel were unobjectionable statements as to the proper trial procedure which

the judge intended to require, e. g., that counsel should object to improper questions before, not after, they were answered; and that the judge, not counsel, should make rulings on evidence and instruct the witnesses. None indicated a position of hostility which could have influenced the jury in its verdict.

II

There is no merit to the contention by petitioners Giallo and Valenti that a mistrial should have been granted by reason of voluntary, allegedly prejudicial testimony by the government witness Ginanatasio, an agent of the Alcoholic Tax Unit, on two occasions. In the first incident on cross-examination Ginanatasio volunteered the statement that he figured Valenti might know him. On objection the judge ordered this remark stricken out, but did not think it necessary to admonish the witness although requested to do so. No motion for a mistrial was made and the cross-examination continued. Clearly, there was no error here, and the majority below thought the point did "not seem at all important."

In the second incident, later in his cross-examination, Ginanatasio volunteered the statement that he told Giallo that he "wasn't arresting him [Giallo] because he was out on bail." Giallo's counsel moved for a mistrial on the ground that the witness had twice volunteered nonresponsive statements. In the first place, the

fact that Giallo was out on bail was innocuous. If counsel had not built up the incident, it probably would have carried no weight. When objection was pressed, the court took every precaution short of declaring a mistrial to prevent prejudice to the petitioner.

In the federal courts the question of discharging a jury before verdict or granting a mistrial is a matter resting within the sound discretion of the trial judge, and the burden is upon the accused moving for a mistrial to show the reasonable possibility of prejudice and that the trial judge's discretion has been abused. Petitioners did not sustain that burden, and the judge acted within his sound discretion in denying the motion for a mistrial after carefully instructing the jury to disregard the voluntary statements of the witness.

ARGUMENT

I

THE TRIAL JUDGE'S EXAMINATION OF WITNESSES AND HIS DIRECTIONS TO COUNSEL DID NOT DEPRIVE PETITIONERS OF A FAIR AND IMPARTIAL TRIAL

Petitioners contend that they were deprived of a fair and impartial trial in violation of the Fifth and Sixth Amendments, in that the trial judge revealed an attitude partial toward the Government and adverse to defense witnesses and counsel, and committed reversible error by reason of his partisan examination of witnesses and his remarks during the trial (Br. 8).

The legal principles applicable to this type of situation are well settled. This Court has made it clear that a federal judge in a jury trial "is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all these matters in a trial not capable of record * * *." *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660; *Quercia* v. *United States*, 289 U. S. 466, 469. For the purpose of eliciting the truth and a full disclosure of all material facts the judge has the right to interrogate both parties and witnesses, and the extent of this interrogation is a matter within his sound discretion. *Glasser* v. *United States*, 315 U. S. 60, 82; *United States* v. *Gross*, 103 F. 2d 11, 13 (C. A. 7); *United States* v. *Kay*, 101 F. 2d 270, 272 (C. A. 2), certiorari denied, 306 U. S. 660. The general rule is aptly stated in *Simon* v. *United States*, 123 F. 2d 80, 83 (C. A. 4), certiorari denied, 314 U. S. 694:

> Appellant's counsel strenuously complains that the trial judge questioned the witnesses from time to time in an effort to bring out the facts of the case. This is precisely what he should have done. It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a

> town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other.

And in *United States* v. *Aaron,* 190 F. 2d 144, 146 (C. A. 2), certiorari denied, *sub nom. Freidus* v. *United States,* 342 U. S. 827, the court observed that the trial judge has:

> * * * the right, indeed the duty, in the exercise of a wise and just discretion * * * to act in the interrogation of witnesses and otherwise to the end that trials will not be mere contests in forensic skill between opposing attorneys, but that the truth shall emerge so far as possible and be given its full legal significance in the judgment. * * *

In *Billeci* v. *United States,* 184 F. 2d 394, 402–3 (C. A. D. C.) the principles were well restated as follows:

> A federal trial judge in a criminal case is not an inert figure. He is not a mere moderator. Besides his own exclusive functions of conducting the trial and declaring the applicable law, he may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid,

> through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In exceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused.

Even if a large number of questions are asked by the judge, this alone does not constitute error. *United States* v. *Aaron, supra,* 190 F. 2d at 146; and see the concession by dissenting Judge Frank below: "I do not feel that the quantum of questioning by the court serves alone as an index of the propriety of his participation" (R. II, 255). The alleged partisanship of the judge, moreover, must be examined, not by considering separate incidents alone, but in the light of the setting of the entire record. Cf. *Todorow* v. *United States,* 173 F. 2d 439, 448 (C. A. 9), certiorari denied, 337 U. S. 925: "Clearly, no one incident is sufficient

to warrant reversal, and to determine whether, in the aggregate, they adversely affected the substantial rights of the appellants, it is necessary to consider them in their natural and proper setting, namely, the *entire record.*" (Italics ours.) And "separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve. * * * nothing conduces less to [insuring an impartial conduct of the trial] than an over jealous scrutiny of every word that may fall from a judge's mouth." *United States* v. *Warren*, 120 F. 2d 211, 212 (C. A. 2). See also the admonition by this Court in *Glasser* v. *United States, supra,* 315 U. S. at 83, for guarding against the "magnification on appeal of instances which were of little importance in their setting."

It is significant that petitioners did not make objection at the trial to the judge's allegedly too extended and partisan examination of the various witnesses, as to which complaint is now made.[2] If counsel had thought the judge's interrogations of the witnesses were becoming too lengthy and partisan in nature, they could have objected at the bench outside of the hearing of the jury at some stage of the trial to make their general position

[2] An examination of the proceedings at the close of the trial indicates that defense counsel did not commence to smart at their treatment by the judge until later when they undertook the preparation of their appellate briefs (Tr. 828–832).

clear.[3] Instead they apparently did not consider the judge's participation objectionable and chose to speculate on a possible acquittal. Having been unsuccessful in this hope, they should not now be permitted to attack the propriety of the judge's participation in the trial. Cf. *United States* v. *Breen*, 96 F. 2d 782, 784 (C. A. 2), certiorari denied, 304 U. S. 585: "All too often, it seems, appellants like these become overcritical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause."

A reading of the entire record, including the typewritten transcript lodged with the clerk, dis-

[3] Despite the dictum in *Williams* v. *United States*, 93 F. 2d 685, 690 (C. A. 9), that "counsel are not held to strict accountability for failure to object or except when the questions are asked by the court," the weight of authority holds that in the absence of objection, allegedly improper statements and questions by the trial court are not reviewable on appeal. As was said in *Troutman* v. *United States*, 100 F. 2d 628, 634 (C. A. 10): "It has been repeatedly held that ordinarily alleged errors taking place during the trial of a criminal case must be called to the attention of the court and thus afford an opportunity to correct them. It was essential to the review of these questions that they be presented to the trial court in some manner." See also *Buie* v. *United States*, 76 F. 2d 848, 849 (C. A. 5), certiorari denied, 296 U. S. 585, rehearing denied, 296 U. S. 662; *Mendelson* v. *United States*, 58 F. 2d 532, 534 (C. A. D. C.); *Heinze* v. *United States*, 181 Fed. 322, 325 (C. A. 2); *Burnstein* v. *United States*, 55 F. 2d 599 (C. A. 9), certiorari denied, 286 U. S. 550; *Callahan* v. *United States*, 35 F. 2d 633, 634 (C. A. 10); *Cusmano* v. *United States*, 13 F. 2d 451, 453 (C. A. 6), certiorari denied, 273 U. S. 773; *Baldwin* v. *United States*, 72 F. 2d 810, 812 (C. A. 9), certiorari denied, 295 U. S. 761.

closes that the judge sought to ferret out the truth by examining both government and defense witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. The judge properly refused to sit back as a mere moderator or umpire presiding over a game of forensic skill between opposing advocates. His questions were numerous, but neither the mere number of questions asked, nor the fact that the true situation as elicited by the inquiries turned out to be adverse to the defense rather than the prosecution, spelled improper, partial advocacy on the part of the judge. It is the Government's position that he acted well within the bounds of permissible discretion in conducting the trial, and that no reversible error resulted. Cf. *Glasser* v. *United States, supra,* 315 U. S. at 82; *United States* v. *Aaron, supra,* 190 F. 2d at 146; *United States* v. *Breen, supra,* 96 F. 2d at 784; *Pariser* v. *City of New York,* 146 F. 2d 431, 433 (C. A. 2); *United States* v. *Amorosa,* 167 F. 2d 597, 600 (C. A. 3); *Simon* v. *United States, supra,* 123 F. 2d at 83; *Moore* v. *United States,* 132 F. 2d 47 (C. A. 5), certiorari denied, 318 U. S. 784; *Texas Pacific-Missouri Pacific Term. R.* v. *Welsh,* 179 F. 2d 880, 881–882 (C. A. 5); *Cusmano* v. *United States, supra,* 13 F. 2d at 452–453; *United States* v. *Lee,* 107 F. 2d 522, 528–530 (C. A. 7), certiorari denied, 309 U. S. 659; *United States* v. *Domres,* 142 F. 2d 477, 479 (C. A. 7), certiorari denied, 323 U. S. 723; *Kirk* v. *United States,* 280

Fed. 506, 507 (C. A. 8); *Hargrove* v. *United States*, 25 F. 2d 258, 259 (C. A. 8); *Todorow* v. *United States, supra*, 173 F. 2d at 448; *Ochoa* v. *United States*, 167 F. 2d 341, 344 (C. A. 9); *Fritts* v. *United States*, 80 F. 2d 644, 646 (C. A. 10); *Callahan* v. *United States, supra*, 35 F. 2d at 634; *Griffin* v. *United States*, 164 F. 2d 903 (C. A. D. C.), certiorari denied, 333 U. S. 857; *People* v. *Knapper*, 245 N. Y. S. 245, 247–248. See also annotation at 84 A. L. R. 1172; Wigmore on *Evidence*, 3rd Ed., § 784.[4] Petitioners have read hostility into action which was designed merely to clarify. The record as a whole shows straightforward, pointed but unloaded, questioning by the judge. That is not improper conduct.

The challenged incidents of alleged improprieties on the part of the trial judge fall within the following general categories: (A) examination of petitioner Juliano; (B) rulings on testi-

[4] The basic principles outlined in the cases we have cited are in general accord with those cited by petitioners (see Br. 15–23). In fact, it is probable that both majority and dissent in the court below, counsel for petitioners and counsel for the government, would all state the legal principles in nearly identical terms. In this kind of situation each case must be decided upon its own particular facts. However, it should be noted that in some of the cases cited by petitioners other errors, such as improper instructions to the jury, were important additional factors in contributing to the reversals. E. g., *Adler* v. *United States*, 182 F. 2d 464, 473–474 (C. A. 5); *Hunter* v. *United States*, 62 F. 2d 217, 220 (C. A. 5); *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); *United States* v. *Brandt*, 196 F. 2d 653, 656–657 (C. A. 2).

mony of government witness DiLorenzo; (C) examination of other witnesses; and (D) remarks to petitioners' counsel. We examine these in more detail, although nothing but a complete reading of the record can really be decisive on this issue.

(A) *Examination of petitioner Juliano.* Particular criticism is directed against alleged partisan examination of petitioner Juliano by the trial judge. The latter half of the record, which was the government's appendix in the court below, contains the entire testimony of Juliano (R. II, 36–172). When the judge's questions are considered in the full context of that testimony as against the condensed version presented by selective excerpts in petitioners' appendix (R. I, 76–129), it becomes readily apparent that he did not exceed the bounds of judicial propriety.

Essentially petitioners' complaints of the type of questioning are illustrated by a series of questions which appear at pages 55–57 of Volume II. Juliano had testified that, after he had abandoned his farm around Labor Day of 1949 and had put it up for sale, he came back during the first week in December to collect some tools. As he was about to leave the farm, a man came up, asked to rent the farm, and Juliano agreed to give him immediate occupancy of the house and barn at $65 per month (R. II, 50–55). Then the court asked a number of questions such as whether Juliano had ever met the man before, whether he

inquired about the man's business, whether he obtained references, etc. (R. II, 55–57). No doubt the answers, which were to the effect that Juliano had rented the dwelling and barn to an absolute stranger without obtaining his address or references, although he had $5,000 worth of equipment under padlock in a garage on the premises, did not serve to make Juliano a very credible witness. The fault lies, however, not in the questions, but in the inherent incredibility of the answers. The questions themselves were not partisan in character. If the answers had been different they would have done as much to support petitioners' case as they did to harm it.

The same sort of questioning occurred later. Juliano had testified that he had bought a set of telephones for a young fellow he found in the farm house when he visited there after he had rented it (R. II, 64). The judge asked whether this person was the same man to whom Juliano had rented the farm, and when the answer was in the negative, asked about the extent of Juliano's equity in the farm (R. II, 65–66). Later, when Juliano testified that on the day of the raid, he had turned back while on the way to the farm because neighbors told him investigators were there and "the biggest distillery you ever saw" (R. II, 80), the court said:

> You mean after you heard that the Federal agents were in possession of your farm

and that a still had been found there? [R. II, 81.]

The court continued the questioning after Juliano then said that "they didn't say any still, but they said there was trouble up there" (R. II, 81).

Similarly, on cross-examination, the questioning by the court, the most extensive of which appears at R. II, 106–110, elicited testimony by Juliano that on one of his visits to the farm after renting it, he asked the men if they worked around there, and they replied that they would have to get some sleep since they were supposed to ride the next day; that he did not ask what or for whom they were riding; that he ate meals with the men on his several visits to the farm; that each time he saw the men they were just playing the radio or lounging around; and that he detected nothing unusual around the premises (R. II, 106–110).[5] Although this questioning probably adversely affected Juliano's credibility, that result followed primarily from the inherent weakness of his replies, and not from the questioning which was designed to elicit the true facts. The questions were in proper and fair form, and the mere fact that the answers tended to favor the prosecution rather than the defense did not make the examination improper. The judge properly left to the jury the determination of Juliano's credibility when he said, "You impress

[5] See also R. II, 99–100, 125–126, 143–145, 151–152.

me as being a rather alert young man. Of course, the jury is to determine whether you are alert" (R. II, 106).*

It is, of course, impossible in the space of a brief to set forth the pages, far more numerous than the ones which are the subject of criticism, in which there were no interruptions by the court. Moreover, it becomes apparent from a reading of the record that many of the questions by the judge, both during direct and cross-examination, were designed either to clarify some point which had been left dangling (E. g. R. II, 39, 40, 52, 63, 76, 111–112, 117, 146) or to explain a matter to the witness (E. g. R. II, 48, 58, 96, 101, 118). The judge's attitude, moreover, was demonstrated by numerous rulings in favor of the defense during the course of Juliano's testimony. For example, even though the government attorney moved to strike out Juliano's self-serving statement of the conclusion that he "didn't think much of [the police] for tearing the place apart" in their search, the judge impartially refused to do so (R. II, 89–90). See also R. II, 62, 70, 82, 83, 95, 164, 165 and 167 for instances where the judge overruled objections by government coun-

* In his final charge to the jury the judge instructed: "You are the sole and exclusive judges of the credibility of each and every witness, as you are of the facts. You are the exclusive judges of the trustworthiness of the witnesses who have taken the stand" (App., p. 38).

sel; and R. II, 115, 134 and 155 for the sustaining of objections by defense counsel.[7]

It is significant that the jury was unable to agree as to Juliano's guilt under count two, the count dealing with possession, with respect to which much of the court's questioning was concerned.

(B) *Rulings on testimony of government witness DiLorenzo.* There is no merit to the contention that the judge's rulings served to rehabilitate the convict DiLorenzo, who was a government witness (Br. 10). It was not error to restrict the cross-examination by defense counsel when he attempted to develop all the circumstances of the witness's admitted manslaughter conviction to show that the death of two children occurred during the illegal operation of a still (R. II, 17–19). Since DiLorenzo had already admitted connection with illegal liquor traffic both with petitioners and on other occasions (R. II, 1, 12, 16), it is difficult to perceive how the jury's knowledge of details of his prior bootlegging with others could have substantially

[7] Other parts of the record also disclose rulings by the judge favorable to, and assisting petitioners, in the presentation of their defense. E. g., R. II, 43, where the judge, in discussing the materiality of certain evidence with counsel for Juliano, who admitted the evidence was "[N]ot too material," ruled, "If it is even slightly material, go ahead with it." See also R. II, 6, 7, 22, 26, 27, 29, 35, 66, 77–78, 162; R. I, 36, 52, 55, 63, 69, 72, 162.

affected his credibility as a witness. He had, moreover, admitted that the manslaughter conviction resulted from the operation of a still (R. II, 18), and since the circumstances of this prior conviction were collateral to the case, the judge acted within his sound discretion in limiting further cross-examination. Cf. *Lee Kwong Nom* v. *United States,* 20 F. 2d 470, 472 (C. A. 2), holding that where an accused had admitted a conviction for bribery and serving a penitentiary sentence, further inquiry as to the length of his sentence was properly excluded, since he had been "sufficiently impeached, and his credibility attacked, by the question and answer which brought forth the admission of his conviction." See also *Coulston* v. *United States,* 51 F. 2d 178, 182 (C. A. 10).

On cross-examination DiLorenzo denied that he was guilty of the conspiracy charges in the indictment. The judge then asked if the witness meant he had nothing to do with the operation of the still, but was just a customer. (R. II, 35–36.) The answer was in the affirmative, this being in effect a repetition of DiLorenzo's previous testimony that his dealings with Giallo and Valenti were limited to selling them a truck and buying some alcohol. But the judge's question could hardly be characterized as rehabilitating DiLorenzo, for the witness, in answering, repeated a prior admission of acts from which the jury could have inferred that he actually was an accomplice

to the conspiracy whose evidence should be received with great caution,[8] despite his protestations of innocence.

Complaint is made as to the judge's questioning DiLorenzo during his direct examination about the purpose for which the truck he was to procure for petitioners Giallo and Valenti was to be used (R. I, 42–43). This was done, however, only after the witness had testified that in the conversation with Giallo and Valenti they told him "the type of truck they wanted, and for what they wanted it for" (R. I, 42). Defense counsel had then interrupted to state, "I would like the conversation without any suggestions, your Honor, if there is any." The judge, without being suggestive, asked the details of the conversation and the answer was that the truck was to be used to carry sugar and alcohol (R. I, 42, 43).

(C) *Examination of other witnesses.* Petitioner complains of other instances where it is contended that the judge erred in interrupting the trial and examining witnesses. In none of these were any substantial rights of the petitioners

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[8] See R. I, 136:

"The COURT. I instructed them specifically with reference to DiLorenzo's testimony.

"Mr. CHAPMAN. With respect to the accomplice——

"The COURT. To scrutinize it very carefully."

The exact language used in the court's charge was: "I charge you that you must weigh and examine very carefully the testimony of DiLorenzo, and that you must do so in the light of his admissions of his wrongdoing" (App., p. 39).

prejudiced. Some of these incidents involved inconsequential and immaterial matters, and others were concerned with parties other than the petitioners. This observation applies to the testimony by government witness White describing the desk from which certain of Juliano's papers were taken by government agents (R. I, 31–33); testimony by government witness Andersen that he recognized defendant Schifano as the man he saw on a parking lot on February 9, 1950 (R. I, 56); testimony by government witness Greenberg that he identified a picture of defendant Schifano (R. I, 59); testimony by government witness Peterkin that he could not recall the days he was absent from work because of sickness (R. I, 60–61); testimony by government witness Bartsch as to whether he understood a question addressed by counsel, and that he had not testified before the grand jury (R. I, 72–73); and testimony by defense witness Jordan as to the day of the week on which she had a party on February 9, 1951 (R. I, 130–131).

There was nothing improper in the questioning of government witness Carroll as to how the truck observed by the agents circled around certain streets, and how it traveled on main thoroughfares in Kingston (R. I, 17–19). This elicited a complete picture of what occurred, and petitioners were eager in any event to show that the truck traveled on main roads rather than surrepti-

tiously.[9] The judge's observation, after government counsel's motion to strike out the word "illicit" from the witness' answer describing the seized distillery, that it was not necessary for him to move if the defendants "don't move" (R. I, 18), was nonprejudicial. The witness corrected his answer to omit the adjective and in any event, there was no serious contention that the distillery was not an illegal one.

(D) *Remarks to petitioners' counsel.* The challenged remarks by the judge to defense counsel, considered either separately or cumulatively, did not constitute reversible error.[10] Some of them were unobjectionable statements by the judge as to proper trial procedure which he intended to prevail. This was true of his admonitions that counsel should object to improper questions before, not after, they were answered (R. I, 19–20); that the judge, not counsel, should make rulings on evidence and instruct the witnesses (R. I, 25–26, 76); that if counsel in the future would ask questions in ill-advised form to evoke

[9] Other questioning complained of similarly was nonsuggestive straight-forward questioning to elicit material facts (R. I, 65–71, 73–75).

[10] In this respect the statement made by Mr. Justice Frankfurter in his dissent in *Glasser* v. *United States*, 315 U. S. 60, 88, is pertinent:

"It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

undesirable answers, he would have to take the consequences (R. I, 58–59); and that counsel should not attempt to have his witness contradict his own testimony (R. I, 92–93).[11]

Other mildly impatient remarks by the judge were innocuous. When the judge reminded counsel that he was the one who should make the ruling as to what answers of government witness Lane would be binding only on petitioner Juliano individually, and with a dash of humor thanked counsel for his guidance, it was counsel who interjected the word "sarcastic" into the colloquy (R. I, 25–26). In another incident it was defense counsel who improperly suggested that his cross-examination was being "telescoped" and we think the judge was correct in interpreting this as "rather presumptuous" (R. I, 40–41). There obviously was no prejudice when the judge, thinking that counsel had a pocket knife in his hand, merely asked him to put it away (R. I, 56).[12]

[11] It should be noted that the judge also impartially rebuked government counsel for improper trial tactics. For example, in the cross-examination of petitioner Juliano by government counsel the following occurred (R. II, 138):

"Q. Major Lane's testimony the other day. A. Yes.

Q. And you heard him testify to what——A. Yes.

Q. (Continuing.) You had told him.

The COURT. That is not proper, Mr. Frank."

See also R. II, 7.

[12] It is difficult to comprehend why both petitioner (Br. 11) and the dissenting judge (R. II, 258) refer to this incident. It may be that the very word "knife" is emphasized because of its sinister connotation.

And when counsel apparently was disturbing the trial in leafing through a notebook which he had had for some time the judge's admonition to stop the shenanigans can hardly be deemed hostile (R. I, 96–97).[13] Nor is it a sign of prejudice that when counsel started saying "I can't take the Government's word" (the tone of which obviously cannot be reflected in the record), the court said, "None of these dramatics" (R. I, 97).

In another incident defense counsel complained of an alleged critical remark by the judge as to counsel's right of cross-examination (R. I, 54–55). This passage shows, however, that even apart from the judge's power to limit the scope of cross-examination in the exercise of his sound discretion, there was no actual limitation. No prejudice resulted since the judge asked counsel if he wanted to continue further cross-examination, to which counsel answered in the negative.[14]

The complaint as to hostility to counsel is clearly an attempt to magnify minor incidents far

[13] For other impertinent and provocative tactics employed by defense counsel, which apparently explain the judge's moderate impatience at sporadic instances during the trial, see R. II, 71–72, 79–80, 123–124, 239.

[14] The judge in his charge to the jury made it clear that they were to disregard any statements he had made to counsel: "The Court instructs you, finally, to disregard any statements that it may have made to counsel during the trial, statements that might seem to you to indicate that the Court has any opinion on the evidence in the case, or might in any way reflect upon the conduct of counsel during the trial" (App., p. 39).

beyond their significance in the course of the trial.

Essentially, the complaint in this case is that the trial judge asked too many pertinent questions. There can be no valid complaint of the questions themselves, which were straightforward, objective and relevant. The real objection is that they were, from petitioners' point of view, too relevant. Thus, in essence, the trial judge is accused of having a more incisive mind, and a better technique in phrasing questions, than counsel for either the prosecution or the defense. It does not, we submit, further the cause of criminal justice to have a well-merited conviction reversed because the trial judge used his ability to get the facts before the jury.

II

CERTAIN VOLUNTARY, NON-RESPONSIVE ANSWERS BY A GOVERNMENT WITNESS ON CROSS-EXAMINATION, WHICH THE COURT ORDERED STRICKEN FROM THE RECORD, WERE CORRECTLY HELD NOT TO REQUIRE THE DECLARATION OF A MISTRIAL

There is no merit to the contention by petitioners Giallo and Valenti that their counsel's motion for a mistrial should have been granted by reason of voluntary, allegedly prejudicial testimony by the government witness Ginanatasio, an agent of the Alcoholic Tax Unit (Br. 23). In both instances involved, the judge made it absolutely clear to the jury that they should disre-

gard the objectionable evidence. The jury presumably respected the judge's instructions and returned a verdict based only on legal evidence. Cf. *Pennsylvania Co. V. Roy,* 102 U. S. 451, 459; *Turner* v. *American Security & Trust Co.,* 213 U. S. 257, 267; *Hopt* v. *Utah,* 120 U. S. 430, 438.

In the first incident, on cross-examination, after Ginanatasio stated that petitioner Valenti was only about eight feet away when he went to a restaurant with Bosco, the witness volunteered the statement, "Because I figured he might know me." On motion of Valenti's counsel, the judge ordered this remark stricken out, but did not think it necessary to admonish the witness although requested to do so. (R. I, 48.) His objection having been sustained, counsel evidently did not consider the incident of great moment, for he immediately continued his cross-examination and did not move for a mistrial. The volunteered statement was silent on the question as to how Valenti might know the witness, and did not necessarily imply that Valenti knew him as an agent of the Alcohol Tax Unit by reason of previous liquor law violations. Clearly, there was no error here, and the majority below thought the point did "not seem at all important" (R. II, 249). Cf. *Hagans* v. *United States,* 170 F. 2d 141, 142 (C. A. 5) [volunteered statement by government witness, that he knew accused because he

had caught him several years before at a still, not error when evidence withdrawn on objection]; *Adams* v. *United States,* 156 F. 2d 271, 274 (C. A. 5), affirmed, 330 U. S. 801.

The second incident occurred later on in the examination of the witness Ginanatasio, and is printed in the margin.[15] Despite petitioners' contention that the witness' volunteered statement was not inadvertent but deliberate, it is significant that the trial judge quite properly did not regard it as such, but as an unwitting and innocuous remark. During the colloquy on the oral argu-

[15] Q. And when you seized the Plymouth black sedan from Mr. Giallo, he told you, to all your questions, directly that he didn't know anything about it and had never been to West Shokan, is that right? A. That is right. I also told him the reason I wasn't arresting him was because he was out on bail——

Mr. CHAPMAN. I am going to move for a mistrial if we have any more of the voluntary statements, your Honor.

The COURT. Mr. Chapman, don't address the Court that way.

Mr. CHAPMAN. No. I, naturally——

The COURT. Don't address the Court that way.

Mr. CHAPMAN. I wasn't addressing your Honor in any way, but you can understand my rancor.

The COURT. Mr. Ginanatasio——

The WITNESS. Yes, sir?

The COURT. —— don't make any statements of that nature again.

Stricken from the record and the jury are instructed to disregard them and erase them from their minds.

Go ahead. Next question.

Mr. CHAPMAN. I think, for the record, I ought to move for a mistrial because the witness has twice volunteered

ment on the motions to set aside the verdict, the judge stated (R. I, 147):

> While a statement of this nature if made by the prosecutor might have justified the withdrawal of a juror and the declaration of a mistrial, a similar statement unwittingly made by a layman, who is testifying during the course of cross-examination, does not warrant the same action from the Court, particularly so where the remark is more or less of an innocuous nature.
>
> There is no statement here as to the details under which he [Giallo] was out on

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statements not responsive to any questions, and serving to prejudice my client.

The COURT. I don't regard that as prejudicial.

Mr. CHAPMAN. Your Honor will overrule it?

The COURT. The jury will erase anything from their minds that I have stricken from the record.

Mr. CHAPMAN. That is a very, sometimes, a very hard thing to do.

The COURT. We will ask the jurors now.

Do any of you feel you cannot erase that from your mind, or any of you feel that that remark which I have ordered stricken from the record would prejudice you in any way in the fair consideration of the guilt or innocence of any of these defendants?

The jury have all indicated in the negative. Your motion is denied.

Mr. CHAPMAN. Exception.

By Mr. CHAPMAN:

As a matter of fact, Mr. Giallo and Mr. Valenti were not arrested in this case until some time in the spring of 1951, is that right? A. After the indictment was handed down.

Mr. CHAPMAN. Can you give us the date of that, Mr. Schaefer?

The COURT. March 29, 1951.

Mr. CHAPMAN. That is right. [R. I, 49–51.]

> bail; there is no statement here by this witness of the nature of the charge on which he was out on bail; there is no statement here of the witness of any conviction, no statement even of an arrest on a criminal charge. The bail might have been posted in some civil matter where a body execution has been issued or other things. It is innocuous.

The jury might very well have inferred from Ginanatasio's remark that Giallo was out on bail for the same crime for which he was being tried, and that clearly would not have been prejudicial. Moreover, as the majority opinion below observes, Giallo's "own attorney increased any likelihood of harm by making it appear of record that he was not arrested on that indictment until March 29, 1951 [about one year after the occurrence in the testimony], and in this way made it known to the jury that he had been accused of some offense other than that for which he was being tried" (R. II, 251).

These incidents are a good illustration of the manner in which petitioners endeavor by exaggeration to build up a charge of prejudicial misconduct. The rebuke to counsel was no stronger than the rebuke to the witness. The ensuing colloquy was occasioned by counsel's attempt to make a big issue of a minor matter. It is, we submit, clear that the judge acted within his sound discretion in denying the motion for a mistrial

after carefully instructing the jury to disregard the voluntary statements of the witness."[18]

In the federal courts the rule is recognized that the question of discharging a jury before verdict or granting a mistrial is a matter resting within the sound discretion of the trial judge. *United States* v. *Perez*, 9 Wheat. 579, 580; *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263, 298. The burden is upon the accused moving for a mistrial to show the reasonable possibility of prejudice and that the trial judge's discretion has been abused. *United States* v. *Stoehr*, 196 F. 2d 276, 283 (C. A. 3), certiorari denied, 344 U. S. 826; *United States* v. *Potash*, 118 F. 2d 54, 56 (C. A. 2), certiorari denied, 313 U. S. 584. Petitioners did not sustain that burden here.

An analogous situation was involved in *United States* v. *Curzio*, 179 F. 2d 380 (C. A. 3), where a government witness on cross-examination in a non-responsive answer mentioned the accused's police photograph, a motion for withdrawal of a juror was denied, and the court instructed the jury to disregard the answer. The language used is apropos in the instant case (179 F. 2d at 381):

> Our own examination of the record reveals no indication that the District

[18] In his final charge to the jury the judge instructed: "You will also disregard all testimony and exhibits which have been stricken from the record; they weren't evidence" (App., p. 39).

> Judge abused his discretion in denying the motion for a mistrial. He acted immediately, affirmatively and without fuss in disposing of what was, under the circumstances, a minor problem. He had seen and heard the entire episode. He was not impressed with the contention that the witness had deliberately tried to inject improper testimony into the trial.

In *United States* v. *Salli,* 115 F. 2d 292, 294 (C. A. 2), where the trial judge had ordered a volunteered statement by a government witness stricken out, Judge Learned Hand was of the opinion that "certainly [the trial judge] was not bound to declare a mistrial, the statement added very little to what was already in evidence." See also *United States* v. *Kushner,* 135 F. 2d 668, 674 (C. A. 2), certiorari denied, 320 U. S. 212; *Marsh* v. *United States,* 82 F. 2d 703 (C. A. 3); *Hilliard* v. *United States,* 121 F. 2d 992, 998–999 (C. A. 4), certiorari denied, 314 U. S. 627; *Claunch* v. *United States,* 155 F. 2d 261, 263 (C. A. 5); *Cavness* v. *United States,* 187 F. 2d 719, 722 (C. A. 9), certiorari denied, 341 U. S. 951.

CONCLUSION

It is therefore respectfully submitted that the judgment of the Court of Appeals should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
JOHN F. DAVIS,
Special Assistant to the Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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comments are not, in your judgment, justified by the evidence, you may disregard the comments. You should also disregard and put aside all remarks addressed to your passion, your prejudice or your sympathy. This courtroom must be regarded by you as a forum of justice and you, as jurors, must endeavor to render a just and fair verdict in so far as it is humanly possible.

* * * * *

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